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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLES R. CHILTON

Respondent.

Case No. ~~78,882~~ 79,115 ← called counsel + should be 79115
[TFB NO. 91,217 (10A)]

REPLY BRIEF

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SYMBOLS AND REFERENCES

The Florida Bar shall be referred to as the Bar.

The Order Granting Respondent's Motion for Summary Judgment dated April 9, 1992 shall be referred to as RR1.

The Report and Findings of Referee Relating to Respondent's Motion to Tax Costs and Motion for Attorney's Fees dated August 26, 1992 shall be referred to as RR2.

The transcript of the Motion for Summary Judgment hearing held on April 9, 1992 shall be referred to as TR1.

The transcript of the Cost Award hearing held on June 29, 1992 shall be referred to as TR2.

The deposition of Linda W. McIntyre dated June 25, 1992, shall be referred to as Depo.

The transcript of the March 24, 1992 hearing in The Florida Bar v. Bosse, Case No. 78,882, shall be referred to as TRB.

ARGUMENT

THE RULES REGULATING THE FLORIDA BAR DO NOT ALLOW A COST ASSESSMENT AGAINST THE BAR IN A DISCIPLINARY MATTER NOR DO THEY ALLOW THE AWARD OF ATTORNEY'S FEES TO EITHER PARTY.

The main thrust of the respondent's argument throughout these proceedings has been and continues to be that the Bas should never have initiated disciplinary proceedings against him because his counsel told the Bar it had no case. The Bar rejects the respondent's contention that it should slavishly follow the advice of defense counsel or of respondent's expert witnesses.

The referee based his recommendation as to costs on his belief that the Bar was on notice that it did not have a case after Bar Counsel Jackson spoke to Linda McIntyre on February 14, 1992 (TR2, p. 105). This is in apparent conflict with the referee's earlier statements. During the April 9, 1992, hearing, he found the question as to whether or not Florida law precluded the adopting parents from pursuing the adoption merely because they were moving out of state to be an open question which he had yet to resolve (TR1, p. 10). He also recognized that the Ear had sorted out the factual situation in a proper fashion (TR1, p. 15). Even at the hearing on June 29, 1992, the referee found that based on the pleadings, justiciable issues existed in this

matter through the conclusion of the final hearing in the The Florida Bar v. Bosse, Case No. 78,882. Thereafter, no justiciable issues remained in the respondent's case (TR2, p. 26). This was long after the final hearing had been held in the Bosse case that had resulted in its recommended dismissal which is pending before this Court.

In recommending the award of costs, the referee analogized the respondent's situation to that of a criminal defendant who has been found not guilty and who is entitled to reimbursement for the costs incurred in defending against the charges (TR2, p. 25). The Bar stands on its previous argument that the referee's recommendation as to costs was erroneous and the respondent's argument that the Bar should have heeded the advice of his defense counsel and not pursue disciplinary proceedings despite a finding of probable cause by the grievance committee is meritless.

In his statement of the case and facts, the respondent presented his version, replete with quotations from the transcripts which, in some instances, were taken out of context, For example, on page seven of the answer brief, the respondent refers to Bar Counsel Jackson's testimony concerning whether or not she advised Mr. Brandon that Ms. McIntyre's deposition had been cancelled due to a scheduling conflict, The respondent asserts that Bar Counsel Jackson misrepresented to Mr. Brandon

the reason for cancelling this deposition. A full reading of this portion of the transcript, however, shows that certainly no intention existed to mislead the respondent's counsel. Bar Counsel Jackson testified as follows: (TR2, p. 85)

> Q: You've heard the deposition testimony of Linda McIntyre; is that correct?
>
> A: Yes.
>
> Q: All right. And she indicated in her testimony something to the effect that she had never indicated to You there was a scheduling conflict. Did you hear her testimony in that regard?
>
> A: Yes.
>
> Q: Did you ever advise anybody that these was a scheduling conflict in regard to her testimony for deposition?
>
> A: I don't specifically recall that. I may have said something but at the time I was also talking to another lady attorney to testify. It may have been her. I may have confused them. I don't specifically remember saying that, but I may have.

If this Court should deem this to constitute prosecutorial misconduct, which the Bar submits it does not, then it clearly does not rise to the same level as that in The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978), and The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978), where each party was ordered to bear its own costs.

The respondent also includes a portion of Bar Counsel Jackson's testimony on pages nine and ten of his brief concerning the research the Bar conducted prior to filing its case. Again, a reading of the full testimony shows the Bar did more than just

legal research. Not only did the grievance committee investigate the allegations and opine as to its interpretation of the adoption statute, but one of the Bar's staff investigators assisted in the committee's investigation (TR2, p. 90).

The respondent attributes great weight to Ms. McIntyre's interpretation of the statute. The Bar contacted Ms. McIntyre originally to testify in the Bosse case as to whether or not an excessive fee was involved (Depo, p. 6). The Bar did not actively seek her opinion as to the statutory requirements for residency. The informal discussion about the statute was then secondary to the fee issue in the Bosse case. The Bar did not accept her assertions that adoptive parents could move from Florida and still qualify for an adoption in this state (Depo, p. 11) because this was in apparent conflict with the wording of Florida Statute 63.185 regarding residency. In fact, during the final hearing in Bosse, Ms. McIntyre testified that, in her opinion, an attorney could file a petition for adoption knowing the adoptive parents were intending to move out of state. Further, she did not believe a move out of state by the adoptive parents necessarily meant the petition for adoption had to be amended so long as the matter could go before the court within ninety days (TRB, pp. 284, 294-297). Further, a child could be placed with adoptive parents who then move out of state so long as the couple were residents of Florida at the time of the placement and HRS was notified (TRB, pp. 294-302).

The Bar had previously contacted other attorneys who handled adoption cases and received different interpretations. In any event, the Bar chose not to present an expert witness and instead left the interpretation of the statute to the referee as finder of fact. The business of presenting dueling expert witnesses is all too well known to the appellate courts for further comment.

The Bar concedes it did not apprise the respondent's counsel of Ms. McIntyre's opinion after learning of it. Bar Counsel Jackson learned of Ms. McIntyre's opinion on February 14, 1992, a Friday (Depo, p. 12). The respondent and his counsel came to the Bar's Orlando office on February 19, 1992, the following Wednesday, at which time the respondent already knew of Ms. McIntyre's position. Therefore, the issue of nofification became moot. In effect, the respondent is arguing the Bar should have contacted his counsel immediately. The Bar submits that it did not act in bad faith by not immediately notifying respondent's counsel by facsimile or telephone. The Bar made no attempt to hide Ms. McIntyre's position as the respondent now appears to assert. The Bar contends it knows of no duty it has to perform the respondent's discovery. Further, the respondent had no outstanding discovery demands for the Bar to produce a witness list and/or reveal as to what the witnesses were expected to testify. Had the respondent done so, the Bar would have responded accordingly. Ms. McIntyre's opinion was fully aired before the referee during the Bosse final hearing where she was

called as a witness by the respondent (TRB, pp. 279-308). Obviously her opinion caused the Bar to further evaluate its position in both cases. As previously stated, the Bar did not agree with her interpretation of the residency requirement and to argue that the Bar, or any party, should accept the opinion of one expert witness without question is to hold that party to an unreasonable standard. In reality, experts often have conflicting opinions as was the case here.

The respondent also takes issue with the Bas's inclusion of a reference to the admission of minor misconduct which was ultimately rejected by the Board of Governors. The Bar did not in any way intend to imply that the respondent admitted he was guilty of the charges or to use same in this proceeding. It was included merely to show that the grievance committee did not ignore the respondent's position and was willing to and did reconsider its initial findings. The Bar does not intend to coerce any attorney into admitting guilt to a charge of which the attorney is innocent. Here, the committee clearly believed the matter warranted a finding that misconduct appeared to have occurred and was willing to entertain a recommendation for the lowest level of discipline even though it initially voted to find probable cause. This was referred to merely to show how the case unfolded.

As for the issue concerning attorney's fees being awarded to

successful respondents, the Bar submits such an award is not applicable to Bar disciplinary proceedings unless this Court so states. It has never done so.

With respect to the cost issue, contrary to the respondent's argument, The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982), is not dispositive. The respondent's case is one of a few where the issue of a respondent's entitlement to costs is being fully argued. The Bar submits that The Florida Bar v. Allen, 537 So. 2d 105 (Fla. 1989), is controlling and significantly absent from the respondent's brief. Simply put, if an expense is not listed as a cost by Rule of Discipline 3-7.6(k)(1)(E), the referee is without the discretion to award it.

One major factor the respondent overlooks is that there were factual and ethical disputes through the conclusion of the Bosse final hearing which were only then resolved. This led the Bar to immediately begin procedures to seek dismissal of the case against the respondent. Apparently Mr. Brandon, the respondent's counsel, did not perceive the Bar's signal to be strong enough and continued preparing for the final hearing (TR2, p. 79). It was not until the conclusion of all the testimony in the Bosee case that Bar Counsel McGunegle made the considered decision to recommend to staff counsel and the Board's designated reviewer not to proceed further with either case. The Bar does not dismiss cases simply because a respondent or opposing counsel requests or demands it.

With respect to the brief of amicus curiae, it is correct that due to the explosive growth of this state and the Bar's membership in recent years the grievance process has become more complex than it was in the "good old days." The Bar is somewhat concerned that Mr. Trawick, who has no firsthand knowledge of this case, can characterize it as he does in his brief. Apparently, he is merely adopting the respondent's position which is that the entire grievance system should be turned around so that no case would be filed unless the grievance committee had already found by clear and convincing evidence that misconduct had occurred.

CONCLUSION

Wherefore, The Florida Bar prays this Honorable Court will review the referee's recommendation as to the assessment of costs against the Bar and deny any award of costs to the respondent because the rule does not provide for such an award and the Bar did not prosecute this case in bad faith, or, in the alternative, deny the respondent's costs and enter an appropriate opinion providing the Bar with guidance as to when an award of a respondent's costs is appropriate. The Bar further prays this Honorable Court will enter an appropriate order denying the recovery of attorney's fees by either party in a Bar disciplinary proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief have been furnished by Airborne Express to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1925; a copy of the foregoing has been furnished by ordinary mail to Mr. Jack P. Brandon, counsel for the respondent, 130 East Central Avenue, Post Office Box 1079, Lake Wales, Florida, 33859-1079; a copy has been furnished by ordinary mail to Mr. Lance Holden, co-counsel for the respondent, 99 Sixth Street, S.W. Winter haven, Florida, 33880; a copy also has been furnished by ordinary mail to Mr. David Ristoff, Co-Bar counsel, The Florida bar, Tampa Airport Marriott Hotel, Tampa, Florida, 33607; and a copy has been furnished by ardinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 3rd day of December, 1992.

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